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April 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 20, 2004

Case No.: TIA-0201

XXXXXXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be granted.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a process specialist, chemical operator, process and operations specialist and a hazard reduction technician at the Rocky Flats Plant (the plant). He worked at the plant for approximately 18 years, from 1984 to 2002.

The Applicant filed an application with OWA, requesting physician panel review of a brain tumor. The Applicant claimed that his illness was due to exposures to toxic and hazardous materials at the plant.

The Physician Panel rendered a negative determination for the brain tumor. The Panel stated that the type of tumor at issue is associated with "severe head trauma, frequent full mouth dental x-rays, and metal dust and fumes." Panel Report at 2. The Panel then went on to state that this type of brain tumor was not associated with ionizing radiation and that, in any event, the Applicant's radiation exposure was low. *Id.* at 2-3.

The OWA accepted the Physician Panel's determination. The Applicant's father filed the instant appeal on the Applicant's behalf. In his appeal, the Applicant challenges the negative determination regarding his brain tumor.

The Applicant disagrees with the Physician Panel's exclusive focus on radiation data. The Applicant states that, although the Panel identified exposures to "metal dust and fumes" as risk factors, the Panel did not discuss whether the Applicant had such exposures. The Applicant asserts that exposures to metal dust and fumes occurred and provides a supporting description. See Applicant's Appeal Letter. He states that exposures included concentrated nitric acid, hydrofluoric acid, hydrochloric acid, hydrogen peroxide, and sodium hydroxide.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

We agree with the Applicant that the Panel did not adequately explain the basis of its determination. The record contains a description of the job of chemical control operator, which identifies the materials involved as follows: "Process chemicals, *i.e.*, acids, bases, calcium metals, hydrogen peroxide, fluoride, fluorine, diesel fuel, methane gas, cleaning solvents, and cryogenic materials. Fissile and radioactive materials, *i.e.*, plutonium, americium, uranium and other metals used, *i.e.*, tantalum, calcium, and beryllium." OWA Record at 32. See also *id.* at 34 (process specialist). Accordingly, given the Panel's recognition of "metal fumes and dust" as risk factors, the Panel should have addressed these descriptions of the Applicant's job and whether it is at least as likely as not that the identified substances were a significant factor in causing, contributing to, or aggravating the Applicant's brain tumor. See Worker Appeal, Case No. TIA-0127 (2005).

As the foregoing indicates, the appeal should be granted. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's decision grant of this claim does not purport to dispose of the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0201, be, and hereby is, granted.
- (2) The Physician Panel Report failed to explain adequately the basis of its determination. Consideration of the materials associated with the Applicant's job category is in order.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 25, 2005